No. 83-370

IN THE

Supreme Court of the United States

October Term, 1982

JOHN W. DUFFELL, III

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. In a case involving Mail and Wire fraud, where eighteen (18) counts of an indictment are so vague as to not allow the defendant to be able to properly prepare a defense and plead double jeopardy nor insure that the Grand Jury indicted petitioner on the same offense the Petit Jury convicted him of, does such an indictment violate the Constititional parameters outlined by this Court?

2. Where defendant and his counsel had a selective prosecution violation issue which they did not become aware of until after the conviction, can this be raised in the first instance on appeal without waiving the issue as mandated by Fed. R. Cr. P. 12(b) (2)?

3. Can a conviction be sustained for mail fraud where there is no evidence that the defendant caused or knew of the mailings alleged and which mailings were sent after the alleged fraud had been executed without exceeding existing guidelines laid down by this Court?

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II. When Defendant and His Counsel, After Conviction, Became Aware That A Selective Prosecution Violation Had Occurred, and Raised the Issue in the First Instance Before the Ninth Circuit, This Did not Constitute a Waiver of the Issue Under Fed.R.Cr.P. 12 (b) (2).

III. A Conviction Can Not be Sustained Under the Mail Fraud Statute, 18 U.S.C. § 1341, Where Routine Business Mailings Were Made After the Alleged Fraud Had Been Executed and Where There is No Evidence That the Defendant Caused or Knew of the Mailings Alleged, Without Exceeding Guidelines Laid Down By By This Court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John W. Duffell, III, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on August 1, 1983.

OPINIONS BELOW

On August 1, 1983, the United States Court of Appeals for the Ninth Circuit entered a Memorandum Order, which has not been officially reported, but is reproduced in Appendix A, *infra*, pages A1 - A4, affirming the judgement of conviction and sentence entered by the United States Courts for the Central District of California on August 23, 1982. On that date, the Honorable Cynthia H. Hall had sentenced Petitioner to a term of imprisonment for six years and a fine of $50,000 plus the cost of prosecution. On April 22, 1982 Judge Hall had filed Orders denying pre-trial motions including a Motion to Dismiss Counts One through Thirty-One on the grounds of vagueness, and made findings of fact and conclusions of law, none of which have been officially reported, but the relevant portions of which are reproduced in Appendix B, *infra*, pages A5 - A6).

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit (Appendix A, *infra*, pages A1 - A4 affirming the judgement of the District Court, was entered on August 1, 1982. This Court's jurisdiction is invoked under 28 U.S. C. 1254 (1).

FEDERAL RULES OF CRIMINAL PROCEDURE AND STATUTES INVOLVED

The Federal Rules of Criminal Procedure provide in pertinent part:

Rule 12 Pleading and Motions before Trial; Defenses and Objections

* * * * * * * * *

(b) **Pretrial Motions.** Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion . . . The following must be raised prior to trial.

* * * * * * * * *

(2) Defenses and objections based on defects in the indictment or information . . .

* * * * * * * * *

(f) Effect to Failure to Raise Defenses or Objections

Failure by a party, to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the Court pursuant to subdivision (c), or prior to any extension thereof made by the Court, shall constitute waiver thereof, but the Court for Cause shown may grant relief from waiver.

* * * * * * * * *

The United States Codes provides in Pertinent Part:

18 U.S.C. § 1341 **Mail Fraud**

Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter . . . or knowingly causes to be delivered by mail . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner John W. Duffell, III, was indicted on September 10, 1981 in forty-one counts of an indictment. Thirty-one of the counts were based on an alleged scheme to defraud, which was described in the first three introductory pages of the indictment, reproduced in Appendix C, *infra*, pages A7 - A9. Of these counts, ten charged mail fraud with specific mailings, commencing on December 20, 1976 and ending April 1, 1977. These included so-called "welcoming" letters, prospectuses, and tax return information. Two charged wire fraud relative to wire transfers of money on December 20 and 23, 1976. Twelve counts charged the interstate transportation of funds obtained through fraud during December, 1976 and involved the transfer of money from one corporation account to another. Subsequently, six of these counts were dismissed upon motion of the government. Another six counts charged fraud in the offer and sale of securities, and all of these counts were similarly dismissed upon motion of the government.

Several motions were filed pre-trial on behalf of the appellant including a Motion to Dismiss Counts One Through Thirty-One on the grounds of vagueness.[1] A hearing on the various pre-trial motions was held, and the District Court subsequently denied or found moot all motions relative to the indictment.

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[1] These became Counts One through Eighteen of the revised indictment.

(The relevant portions of this order are included herein. See Appendix B, *infra*, pages A5 - A6).

A jury was selected and Petitioner was subsequently convicted on all twenty-eight counts of the revised indictment. Timely post-trial motions were filed and denied, and on August 23, 1982 Petitioner was sentenced to a period of imprisonment of six years and a fine of $50,000 plus costs of prosecution. A timely appeal was filed, and the Court of Appeals for the Ninth Circuit affirmed, filing a Memorandum Order on August 1, 1983.

Although no pre-trial hearing testimony or argument was transcribed, trial counsel alleged that the first thirty-one Counts of the indictment were unconstitutionally vague. This Motion was denied.

The pertinent testimony offered at trial through several Government and defense witnesses is synopized as follows:

In 1975 the Petitioner, a twenty-eight year old, was a partner in a business which brokered loads for long haul tractor-trailer rigs throughout the United States and Canada. He later met Mr. Gearhart Steffen and Mr. John Erickson, much older men, who had had previous experience in selling tax-sheltered investments, in 1975 while seeking insurance for the brokerage business. After this meeting, Petitioner, Steffen, and Erickson decided that a business of investor owned rigs, operated by a brokerage company could be beneficial to all involved. The investors would benefit by taking advantage of the tax incentives granted by Congress for investments in such property, and under the 1975 tax laws could do so with no financial risk, other than their original investment. The brokerage company would benefit by having a large number of trucks under their control with little or no cash outlay. Hence Freight Trucks, Inc. was born.

This decision resulted in retaining Mr. W. Rodney DeVilliers, Esquire, to prepare offering memoranda for the purpose of selling shares in limited partnership. They, in turn, would purchase a truck and trailer from Freight Trucks, Inc. and enter into an operating agreement with Road America Freight Systems, Inc., a wholly-owned operating company of Freight Trucks, Inc. Freight Trucks, Inc. was formed to purchase the equipment, financing the major portion with conventional lenders and resell it to the partnership financing 80% of the resale price on a non-recourse basis. The equipment was then to be operated and maintained by affiliated companies in what was referred to as the Freight Trucks System.

Petitioner was responsible for the acquisition and operation of the equipment until November of 1976 when he relinquished management control to one James Power, who had been brought in to run the operation by Steffen and Erickson. Power also became a 50% owner of Freight Trucks, Inc.

The government presented evidence that trucks were ordered for the limited partnerships. Although more than enough trucks were ordered, Freight Trucks, Inc. was unable to consummate the purchase of enough equipment to satisfy the number of limited partnerships that had actually been funded. This was due to their inability to obtain financing even though the Petitioner had offered his personal guarantee, as the prospectus required, in previous truck purchases.

Over 75% of all partnerships ever funded were formed in November and December of 1976, when Appellant was no longer in a management position, and he was not even advised as to the exact number of limited partnerships being sold.

After a limited partnership was formed and the relevant documents filed with the County Recorder, letters were sent by Steffen and Erickson to the limited partners as alleged in Counts 1 through 10 of the Revised Indictment. Six letters sent in December 1976 and January 1977 were letters welcoming individuals into the limited partnerships. Three letters were informational letters concerning tax matters, and the remaining letter of April 12, 1977 was a propectus which Erickson and Steffen failed to provide at the time the limited partners subscribed. There was no evidence whatsoever, that Appellant requested that these letters be sent, knew what they had been sent or knew or had reason to believe that Steffen and Erickson contemplated sending such letters.

After the verdict was rendered and argument commenced concerning the bail status of Petitioner, the prosecutor stated the following:

> "The fact that the defendant has a business recording cassettes and holding seminars in which he advises people to use tax havens in order to make it possible for people to find their money . . ."

At the close of the post-trial motion hearing the District Court Judge placed on the record her understanding of the jury's view of the case. It was as follows:

> "My understanding is, they consulted my instructions on numerous occasions which were given to them in writing, and that what upset them most is that they felt they had

> only one of the people involved in this scheme before them on trial whereas they felt that there were others who were equally guilty."

At sentencing the Judge reiterated this theme and stated the following:

> "Indeed, I acknowledge that there were in fact others involved in this fraud whose culpability was substantial and whose deeds were utterly unconscionable"

REASONS FOR GRANTING THE WRIT

I. An Indictment Can Not Be So Vague As to Neither Allow a Defendant to be Able To Properly Prepare and Plead Double Jeopardy Nor Insure That He Will Be Convicted of the Same Offense He Was Indicted On and Still Meet the Constitutional Parameters Outlined By This Court.

In affirming the Court below on this issue the Ninth Circuit clearly rendered a decision in conflict with the decisions of other federal Courts of Appeals on this matter and also decided a federal question in a way which conflicts with applicable decisions of this Court.

In order to pass Constitutional muster, an indictment must furnish Petitioner with a sufficent description of the charges against him to enable him to prepare his defense, to ensure that he is prosecuted on the basis of facts presented to the Grand Jury, to enable him to plead Jeopardy against a later prosecution, and to inform the Court of the facts alleged so that it can determine sufficiency of the charge. *Russell v. United States*, 369 U.S. 749, 763, 768 n. 15 (1962). To perform these functions, the indictments must set forth the elements of the offense charged and contain a statement of the facts and circumstances that will inform the accused of the specific offense with which he is charged. *Hamling v. United States*, 418 U.S. 87, 117-18 (1974); Fed.R.Cr.P. 7 (c) (1). The failure of the indictment to detail each element of the charged offense generally constitutes a fatal defect which could not be cured by the Court below either by amendment or jury instructions. *Hamiling, supra*. Certainly the prosecuting attorney or the Court could not be allowed to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment. *Russell, supra* at 770-71. Finally, the mere tracking of the language of the statute may not sufficiently satisfy pleading requirements if the Indictment fails to allege an essential element of the offense or the minimum facts required to fulfill the minimum purposes of indictments. *Hamling, supra*.

The following cases are illustrative of the appropriate indictment format as mandated by *Russell, Hamling* and Fed.R.Cr.P. 7 (c) (1), which is absent in the instant case: *United States v. Curtis*, 506 F. 2d 985 (10th Cir. 1974); *United States v. Brickley*, 296 F. Supp. 742 (E.D. Ark. 1969); *United States v. Amick*, 439 F. 2d 351 (7th Cir.), *cert. denied* 404 U.S. 823 (1971); *United States v. Cohen*, 516 F. 2d 1358 (8th Cir. 1975).

The instant Indictment by contrast failed to place the alleged mail fraud violations within any specific time frame. The indictment alleged no starting date for the scheme even though there was grand jury testimony by key participants in the Freight Trucks system. The indictment was also deficient in not stating in definite terms how much of the monies collected for truck partnerships was misappropriated by Petitioner. Thus, Petitioner was not apprised of the specific amounts of investor funds for which he must account in defending himself. Finally, paragraphs 4 (b) and 4 (c) in the introductory charging section of the indictment setting out the scheme to defraud failed to allege that the statements made to the General Partners involved were false at the time they were made or that Petitioner then knew them to be false. In fact, these two charging paragraphs allege inconsistent theories.[2].

Because a particular time frame was not alleged the prosecutor was able to shift his theory of the case as the evidence developed, while the defense was forced to guess when the scheme began. This not only prejudiced Petitioner in preparing his defense but also was so vague as to not enable him to plead jeopardy should subsequent prosecutions arise. Moreover, this failed to guarantee that Petitioner was prosecuted on the basis of facts presented to the Grand Jury. The second insufficiency regarding the unspecified sums of monies unproperly spent merely compounds the problem.

Finally, the failure to allege that Appellant knew the said representations were false when made irrevocably seals the defect. The form for a mail fraud indictment suggested by the Federal Rules of Criminal Procedure (Form 3), as cited and approved in *United States v. Curtis*, 506 F. 2d 985, 987-8 (10th Cir. 1974), highlights this failure and states in pertinent part:

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[2] See indictment in Appendix C, *infra*, p. A7 - A8

> "To obtain money and property by means of the following false and fraudulent pretenses, representations and promises *well knowing at the time that the pretenses, representations, and promises would be false when made . . .*"
> (emphasis added)

The *Curtis* indictment vaguely alleged that the defendant made "false and fictitious representations about the services of a computer matching service for single persons" Id. at 988. The Court found that the scheme and artifice to defraud or the false and fraudulent pretenses, representations and promises referred to in that indictment was left to speculation and that the Grand Jury may have had a concept of the scheme different from that relied upon by the government before the trial jury. Moreover, the trial jury could have conceived the scheme as something essentially different from that upon which the government relied. Id. at 992.

In *United States v. Nance*, 533 F. 2d 699 (D.C. Cir. 1976) the Court disapproved of an indictment which alleged that false representations were made without specifying what those representations were. Id. at 700. Thus, the manner in which those misrepresentations were false and the allegedly fraudulent content thereof were missing.

Due to the many decisions cited herein which are, in conflict with the Court below only this Court under its supervisory powers can make the decision of the Court below comport with prior decisions of this Court and of the other Circuits cited herein.

II. When Defendant and His Counsel After Conviction Became Aware That A Selective Prosecution Violation Had Occurred, and Raised the Issue in the First Instance Before the Ninth Circuit, This Did Not Constitute A Waiver of the Issue Under Fed.R.Cr.P. 12 (b) (2).

Under Fed.R.Cr.P. 12 (b) (2), defenses and objections based on defects in the indictment or information must be raised by pre-trial motion. In the case at bar, defendant and his counsel became aware of a selective prosecution violation after conviction and raised the issue in the first instance before the Ninth Circuit, asserting a violation of the plain error doctrine, pursuant to Fed.R.Cr.P. 52 (b). The Ninth Circuit found that this issue was waived under Fed.R.Cr.P. 12 (b) (2). It further found that the issue was "frivolous in any event, for Duffell did not allege that he was being prosecuted in retaliation for the exercise of his First Amendment right to advise taxpayers until after the verdict was returned."

This Court has specifically addressed the issue of raising frivolous matters in judicial proceedings. In *Ellis v. United States*, 356 U.S. 674 (1958), this Court found that if court-appointed counsel, acting as an advocate, is convinced that an appeal is frivolous, he may ask to withdraw as counsel because of that. In *Anders v. California*, 386 U.S. 738, 744 (1967), this Court reaffirmed *Ellis* and added the requirement that the request to withdraw be accompanied by a brief referring to anything in the record that might arguably support the appeal. It is prudent for trial attorneys to realize that in a day and age when court dockets are filled to capacity and judges are overworked that frivolous motions should not be filed.

A selective prosecution issue should be raised only when the following requirements can be shown prima facie: (1) a selective prosecution of one or a group of individuals where there are others who are similarly situated, and (2) a selection deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. *Oyler v. Boles*, 368 U.S. 448, 455-456 (1962). Such an arbitrary classification would occur where prosecutions were purposefully commenced only against individuals who chose to exercise their First Amendment rights.

In the instant case, although the defendant and his trial counsel were aware that one Michael Jents was immunized pre-trial, he did not become aware that Steffen and Erickson received immunity until after the trial began.[3] At the close of the Post-Trial Motions hearing and again at the time of sentencing, Judge Hall stated that the jury was quite upset because they felt

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[3] The fact of Steffen and Erickson's immunity is disputed, but the fact that they were not charged with the same crimes is not in dispute.

there was only one of the people involved in the alleged scheme before them on trial, and they also felt that there were others who were equally guilty.[4] Thus, only one of perhaps several individuals was actually indicted and tried.

Although it is likely that Petitioner's trial counsel knew that the first prong had been satisfied, they in no way, could have known until after conviction that the second prong had been satisfied. It was not until argument commenced, concerning the bail status of the Petitioner, that the prosecutor let it be known that his motive for prosecuting Petitioner was based upon the facts that Petitioner advised people in the use of tax havens and therefore because he exercised his First Amendment rights.[5] Thus, to raise a selective prosecution motion pre-trial would have been frivolous because both prongs could not be made out.

This court has previously considered waiver under Fed.R.Cr.P. 12 (b) (2). In *Shotwell Mfg. Co. v. United States* 371, U.S. 341 (1963), challenges to grand and petit jury arrays were made some four years after trial. However, the Court found that there was no cause shown.[6] and held that the

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[4] For Judge Hall's full statement, see page 6, *supra*.

[5] For the prosecutor's full statement, see page 6, *supra*.

[6] Under Fed.R.Cr.P. 12 (b) (2) at the time *Shotwell* was decided, the Rule stated "Failure to present any such defense, or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." This presently codified under Fed.R.Cr.P. 12 (f).

Petitioner had waived the issue and affirmed the Courts below. The District Court's factual findings had shown "that the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial." Id at 362-363.

In *Davis v. United States*, 411 U.S. 233 (1973), this Court reaffirmed its principles. The Court there stated:

> "We believe that the necessary effect of the Congressional adoption of Rule 12 (b) (2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that rule requires." 411 U.S. at 242.

Both cases also require a showing of prejudice. *Shotwell, supra* at 363; *Davis, supra* at 244. In the instant case if there was a finding of selective prosecution, the remedy under Ninth Circuit law would have been an acquittal. *United States v. Steele*, 461 F. 2d 1148, 1151 (9th Cir. 1972). By contrast, in *United States v. Elam*, 678 F. 2d 1234, 1250-1251 (5th Cir. 1982), where the defendants failed to raise pre-trial a claim of duplicity in a single count indictment and no defendant was in jeopardy of receiving consecutive sentences, the Court found no actual prejudice had been demonstrated.

The Court of appeals failing, to even address the aspect of cause shown, indicates that the Court deviated from the decisions of this Court and other Circuits. In *United States v. Gerald*, 624 F. 2d 1291, 1300 (5th Cir. 1980); *United States v. Grandmont*, 680 F. 2d 867, 872 (1st Cir. 1982); *United States v. Williams*, 544 F. 2d 1215, 1217-1218 (4th Cir. 1976); and *United States v. Cariello*, 536 F. Supp. 698, 702 (D.N.J. 1982), the Courts all considered the aspect of cause shown in ruling on a waiver issue.

It is incumbent upon this Court to use its supervisory powers to instruct and guide the lower courts in the rules promulgated by this Court and to insure that those rules will be used and followed in a uniform manner.

III. A Conviction Can Not Be Sustained Under the Mail Fraud Statute, 18 U.S.C. § 1341, Where Routine Business Mailings Were Made After the Alleged Fraud Had Been Executed and Where There Is No Evidence That the Defendant Caused or Knew of the Mailings Alleged, Without Exceeding Guidelines Laid Down By This Court.

This Court has placed limits on the Mail Fraud Statute, 18 U.S.C. § 1341, on several occasions and set guidelines for violations of that statute. In the case at bar, the Court below that: "The Jury could reasonably have concluded that these letters were intended to lull the victims of the scheme and so were mailed in furtherance of the scheme. See *United States v. Sampson*, 371 U.S. 75 (1962)" Although Petitioner feels that *Sampson* is a correct statement of the law, it is contended that *Sampson* was improperly applied to the present case and also that other decisions of this Court were disregarded by the Court below in reaching its decision.

This Court over a period of many years has consistently stated that under this statute, all mailings must be for the purpose of executing the scheme and must be a step in furtherance of the receipt of its fruits. *Kann v. United States*, 328 U.S. 88 (1944). *Parr v. United States*, 363 U.S. 370 (1960); *United States v. Maze*, 414 U.S. 395 (1974). The Court below in its one sentence holding (quoted above) does not give any reasoning why the ten alleged mailings were lulling letters.

A look at these letters shows that the six welcoming letters were sent to those who already invested. Moreover, they were sent at a time when the Petitioner was no longer in charge of the operations of the Freight Trucks System and was merely a consultant, delegated to the role of purchasing trucks. In fact, during the period those in control siphoned monies into secret accounts unknown to Petitioner. The three letters concerning tax matters were merely informational and were sent by Steffen and Erickson without either the knowledge and/or approval of the Petitioner.[7] The final mailing was a prospects sent to a limited partner by Erickson which was supposed to have been sent before the investor invested and was not a mailing contemplated by the Scheme as alleged.

None of these mailings were made or caused by Petitioner or were even reasonably forseeable. *Pereira v. United States*, 347

[7] It is to be presumed that Steffen and Erickson were among the group that Judge hall and the jury felt were guilty along the Petitioner. See page 7 *infra*.

U.S. 1,8,12 (1954). Moreover, no conspiracy was charged, and the acts of co-owners, general partners, or employees cannot be deemed to be the acts of Petitioner.

The evidence showed that all monies had been collected by the time these mailings had been made. It further showed that Petitioner was not in control of operations when many of the mailings were sent. In fact, when Petitioner re-established his control over operations in late February, 1977, he sought and eventually received over $387,000 in personal loans to save the Freight Trucks System. He eventually paid over $680,000 from his personal accounts to keep the venture alive. It is ironic that these financial transactions were not alleged as tactics to lull investors.

The evidence does not support the theory that these were lulling letters even with all reasonable inferences in favor of the government. *Glasser v. United States*, 315 U.S. 60 (1941). In *Sampson* lulling letters were described as those sent to give the venture the appearance of legitimacy or otherwise to postpone inquiry and actions. 371 U.S. at 80. However, there are important aspects of that case that are missing in the present case. Primarily, the indictment in *Sampson* called for and envisioned mailings "'for the purpose of lulling said victims by representing that their applications had been accepted and that the defendants would therefore perform for said victims the valuable services which the defendants had falsely and fraudulently represented that they would perform.'" Id. at 78 (footnote omitted). Moreover, that plan envisioned and carried out further subterfuge such as the compilation of false financial data and the investigation of complaints from their victims to further lull these victims. Id.

In the case at bar, no such "deliberate and planned use of the United States mails" was alleged. Thus, factually the two situations are so different that the principles of *Kahn*, *Parr* and *Maze* are invoked. One further difference is that no conspiracy was charged herein. As stated in *Parr:* "no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process." 363 U.S. at 394.

For all of the aforesaid reasons, it is respectfully submitted that only this Court using its supervisory powers can correct the erroneous ruling of the Court below and assure that the decisions of the Courts of Appeals will be congruent with the decisions of this Court.

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted as to all questions presented herein.

Respectfully Submitted,

Mark D. Schaffer
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
The Ninth Circuit
No. 82-1513

UNITED STATES OF AMERICA,
Plaintiff-Appelle,

v. MEMORANDUM

JOHN W. DUFFELL, III,
Defendant-Appellant

Appeal from the United States District Court for the Central District of California Honorable Cynthia H. Hall, Presiding

Before: FERGUSON and BOOCHEVER, **Circuit Judges,** and SCHWARZER, **District Judge***

(Filed Aug. 1, 1983)

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* Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

John Duffell appeals from his conviction of ten counts of mail fraud, two counts of wire fraud, six counts of transporting funds obtained through fraud, and ten counts of aiding the preparation of false tax returns. The indictment charged that Duffell syndicted approximately 150 limited partnerships to raise money for the trucking business in which he was ostensibly engaged; that he misrepresented to the limited partners that their funds would be used to purchase a truck and trailer for each partnership and to pay the truck's operating expenses; and that he caused the preparation and distribution of tax returns which reflected nonexistent transactions.

Duffell attacks his convictions on five grounds. First, he asserts that counts 1-18 (mail fraud, wire fraud, and interstate transportation) of the revised indictment were unconstitutionally vague because the scheme to defraud was not alleged to have commenced at any particular time but only "on a date known and continuing through May 1977," and because the indictment did not specify how Duffell used the $8 million he raised but simply alleged that he used the money "for purposes other than the purchase of trucks and the payment of truck operating expenses." It was unnecessary for the grand jury to pinpoint the inception of Duffell's scheme. Each of the eighteen counts alleged that a particular item was mailed, wired, or transported on a particular date; the indictment thus clearly furnished Duffell with "a sufficient description of the charges against him to enable him to prepare his defense . . . (and) to plead jeopardy against a later prosecution." *United States v. Cecil*, 608 F. 2d 1294, 1296 (9th Cir. 1979). It was also unnecessary to specify how Duffell used the limited partners' funds. The fraud consisted in using them for any purpose other than that represented to the investors.

Duffell's second contention is that counts 13-16 are multiplicitous and that counts 17 and 18 are duplicitous because the checks on which those counts are based were mailed together. The government concedes that this is true. It argues, however, that Duffell's two motions to compel an election, one made before trial and the other at the close of the government's case, were both premature; the evidence did not show that the checks had been transported together until Duffell testified to that effect.

Even assuming that the court erred in denying Duffell's motions, however, the error would not be a ground for reversal. At sentencing the court consolidated counts 13-16 into one

count and counts 17 and 18 into another; the sentences on the consolidated counts were to run concurrently with each other and with the mail fraud sentences. Duffell was therefore in no way prejudiced. Where multiplicitous indictments result in cumulative sentences, the appropriate remedy is to remand the case for dismissal of one count. But if a defendant receives only one sentence, or concurrent sentences, there is no reason to upset the disposition of the trial court. *See United States v. Le Pera*, 433 F. 2d 810, 813 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971).

Third, Duffell argues for the first time that he was the victim of selective prosecution. Such a claim must be presented to the trial court in conformity with the requirements of Fed.R.Crim.P. 12 (b) (2). *United States v. Oaks*, 508 F. 2d 1403 (9th Cir. 1974). Because it was not, the claim was waived. It is frivolous in any event, for Duffell did not allege that he was being prosecuted in retaliation for the exercise of his First Amendment right to advise taxpayers until after the verdict was returned.

Fourth, Duffell asserts that the trial court impermissibly restricted his cross-examination of a government witness, John Erickson. Duffell sought to impeach Erickson by introducing evidence of civil fraud actions against him. The court prohibited any reference to a default judgement against Erickson or to pending civil litigation; it permitted Duffell, however, to inquire into a consent judgement and SEC injunction against Erickson and into the conduct on which the civil suits were based. This was a proper exercise of the judge's discretion under Fed.R. Evid. 608 (b). The mere filing of a lawsuit (or the winning of a default judgement) is not so probative of a defendant's untruthfulness that to exclude it from evidence is an abuse of discretion.

Finally, Duffell argues that the evidence was insufficient to support his convictions. In the course of a seven-week trial the government introduced overwhelming evidence of Duffell's guilt. Virtually every participant in the scheme, including the general partners, their employees, the limited partners whom they solicited, Duffell's employees, and Duffell himself testified to its details. There was ample evidence that Duffell misrepresented to the general and limited partners through welcoming letter, K-1 forms, and verbal assurances that trucks had been purchased for every partnership.

Duffell asserts that there could be no mail fraud because the mailings were sent after the limited partners had already parted with their money. The jury could reasonably have concluded that these letters were intended to lull the victims of the scheme and so were mailed in furtherance of the scheme. *See United States v. Sampson*, 371 U.S. 75 (1962).

Duffell contends that the tax fraud convictions should be reversed because they are supported principally by the testimony of Michael Jents, which "should be completely discredited." This is an argument for the jury, not for an appellate court. He also argues that Duffell could not reasonably have foreseen that the checks in counts 17 and 18 would be transported from one state to another; the evidence showed, however, that the checks were made out at his instance to the account of a company he owned (R. 576-77).

The convictions are affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 81-1075-CHH ORDER

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN WILSON DUFFELL, III,
Defendant

Defendant's pretrial motions came before this Court for hearing on April 19, 1982. David Hinden and Michael Mayock appeared for the defendant and Henry Rossbacher, Assistant U.S. Attorney, appeared for the Government. The Court has considered the evidentiary matters and the points and authorities submitted in support of and in opposition to the motions and the oral argument.

IT IS HEREBY ORDERED that:

(1) Defendant's motion to dismiss Counts 1 through 32 of the indictment for vagueness is denied:

• • • • • • • • • • • • • • • • • • •

This Order is based upon the following considerations.

1. In determining the validity of the indictment, the Court must determine whether the indictment provides the substantial safeguards to the defendant for which it was designed. *United States v. Cecil*, 608 F. 2d 1294 (9th Cir. 1979). The indictment must "furnish the defendant with a sufficient description of the charges against him to enable him to prepare his defense, to ensure that the defendant is prosecuted on the basis of the facts presented to the grand jury, to enable him to plead jeopardy against a later prosecution, and to inform the Court of the facts alleged so that it can determine the sufficiency of the charge." 608 F. 2d at 1296.

The Court finds that the indictment in this case is sufficiently specific to provide these safeguards. Unlike the indictments found invalid in the cases on which defendant relies, the indictment here sufficiently alleges the factual particulars of the

charged offenses and sets forth the representations that allegedly were false. *See, e.g., United States v. Cecil*, 608 F. 2d at 1297 (dismissal "predicted upon the absence of any factual particularity"); *United States v. Nance*, 533 F. 2d 699, 700 (D.C. Cir. 1976) (indictment "fail[ed] to set forth any of the 'representations' that allegedly 'were untrue'"); *United States v. Curtis*, 506 F. 2d 985, 992 (10th Cir. 1974) (indictment plead "little more than the statutory language without any fair indication of the nature or character of the scheme or artifice relied upon, or the false pretences, misrepresentations or promises forming a part of it").

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APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CR 81- _____

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN W. DUFFELL, III
Defendant

INDICTMENT (Revised)
(18 U.S.C. §1341: Mail Fraud; 18 U.S.C. §1343: Wire Fraud; 18 U.S.C. §2314: Interstate Transportation of Funds Obtained Through Fraud; 26 U.S.C. §7206 (2): Aiding and Assisting the Preparation of False Tax Returns)

The Grand Jury charges:

COUNTS ONE THROUGH TEN

(18 U.S.C. §1341)

A. Introduction

1. At all times material herein, defendant JOHN W. DUFFELL, III ("DUFFELL") was ostensibly engaged in the business of purchasing and operating trucks. DUFFELL raised monies for the business through the sale of limited partnership interests.

2. Defendant DUFFELL formed and contolled numerous companies, purportedly to assist in the operation of the ostensible trucking businss. These companies included, but were not limited to, the following:

(a) Bookkeepers, Inc.
(b) Commerce Consultants
(c) Distributive Interactive Systems Corp. (DISC)
(d) Freight Financial Corp.
(e) Freight Trucks, Inc.

(f) Meadow Maintenance
(g) Trans Agency
(h) Tumbleweed Transportation
(i) Road America Freight Systems, Inc.

3. Beginning on a date unknown to the Grand Jury and continuing through May, 1977, within the Central District of California and elswhere, defendant DUFFELL knowingly and willfully devised and executed a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises.

B. The Scheme

4. Specifically, defendant DUFFELL devised and carried out the scheme in the following manner:

(a) Defendant DUFFELL solicited certain persons (hereinafter "general partners") to organize approximately 150 separate limited partnerships and to sell partnership interests to more than 750 people (hereinafter "limited partners") for the ostensible purpose of purchasing and operating commercial trucks for profit and as a tax shelter.

(b) Defendant DUFFELL caused the general partners to collect more than $8,000,000 from the limited partners by falsely representing to the limited partners that the money they paid would be used to purchase a truck for each partnership and to pay the truck operating expenses.

(c) Defendant DUFFELL caused the general partners to transfer the more than $8,000,000 collected from the limited partners to bank accounts maintained by defendant DUFFELL and his agents, by falsely representing that he would use the funds collected to purchase the trucks by the end of calendar year 1976 and to pay for the truck operating expenses for which the general partners were responsible.

(d) Defendant DUFFELL thereafter spent large portions of the more than $8,000,000 for purposes other than the purchase of trucks and the payment of truck operating expenses.

(e) Defendant DUFFELL than concealed the wasting of the partnership proceeds and his failure to purchase a truck for each partnership by disseminating to the general partners and, consequently, to the limited

partners, false and misleading information concerning the trucks, which, *inter alia*, resulted in the submission by those general and limited partners of incorrect tax returns to the Internal Revenue Service.

* * * * * * * * * * * * * * *